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**Government of the District of Columbia
Public Employee Relations Board**

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In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department,)	
)	
Petitioner,)	PERB Case No. 06-A-18
)	
and)	Opinion No. 870
)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
(on behalf of Stanley Barker),)	
)	
Respondent.)	
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DECISION AND ORDER

I. Statement of the case:

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") which rescinded the termination of Stanley Barker ("Grievant") a bargaining unit member. MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction...." D.C. Code §1-605.02(6) (2001 ed.)

II. Discussion:

The circumstances that gave rise to this action occurred in the early morning hours of April 5, 2002. The Grievant, assigned to the First District, was off duty and driving his personal vehicle on New York Avenue. "He maintained he was on his way to a 'gentleman's club.' While stopped at the intersection of New York and Florida Avenue, he was approached by an individual asking for a ride home to the 200 block of N Street, Northwest. He asserted that he believed this individual was female. In fact, the individual was a male transvestite prostitute, and the area is frequented by such types." (Award at p. 2)

"The Grievant maintained that he drove the individual (hereafter referenced by the male pronoun, or by his name, Kelvin Jackson) to the requested block because of the late hour and the unsafe neighborhood. When they arrived, the grievant pulled into an ally behind the block, as he maintained, at Mr. Jackson's request." (Award at p. 2)

While the Grievant's car was parked in the alley, Officer Alec Corapinski was on routine patrol in the area and spotted the car. He testified that he noticed the two in the car apparently engaged in sexual activity. At this point, Officer Corapinski did not yet know the identity of the driver, or that he was a police officer. "Officer Corapinski [pointed] his spotlight [at] the car and saw the front seat passenger pick his head up from the area of the driver's lap and begin wiping his mouth, while the driver removed a condom from his lap area." (Award at p. 2)

The driver then got out of his car and began walking toward Officer Corapinski while reaching into his pocket. At this point, Officer Corapinski ordered the driver to get back in his car and remove his hand from his pocket. Instead of complying, the driver continued toward him, whereupon Officer Corapinski ordered the driver to place his hands on the hood of the car. Officer Corapinski testified that he asked the driver if he was a Police Officer, and he replied "No." (See Award at p. 3) Officer Corapinski claimed that he became fearful for his safety, drew his gun and called for backup. When backup officers arrived, one of them recognized the driver, who then identified himself as a police officer. (See Award at p. 3) The Grievant was not charged with a criminal offense and was released.

Following an investigation of this incident, the Grievant was charged with conduct unbecoming a police officer and knowingly making an untruthful statement. (See Award at p. 3)

On April 3, 2003, MPD informed the Grievant that it was preparing an adverse action against the Grievant. The April 3rd notice advised the Grievant that if he desired a Departmental hearing, one would be scheduled on May 22, 2003. (See Award at p. 5) On the same day he was served with the notice of proposed adverse action, April 3, 2003, the Grievant requested a Departmental hearing. He requested and was granted a continuance of the May 22, 2003 hearing, and the hearing was convened on June 19, 2003. (See Award at p. 5) Additional hearings were conducted on July 22 and August 6, 2003.

The hearing panel found the Grievant guilty and unanimously recommended that the Grievant be terminated from the MPD. (See Award at p. 1) On September 16, 2003, MPD

informed the Grievant of the final decision to terminate his employment, effective October 17, 2003. FOP appealed the matter to the Chief of Police. The Chief of Police denied the grievance and FOP invoked arbitration pursuant to the parties' collective bargaining agreement ("CBA").

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within fifty-five (55) days of the date that the Grievant requested a hearing. (See Award at p. 5) Article 12, Section 6 of the parties' CBA provides in pertinent part that an employee "shall be given a written decision and the reasons therefore no later than . . . 55 days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing." (Award at p. 6) FOP argued that the Grievant was notified of the charges on April 3rd, but was not served with the final decision until September 16, 2003. (See Award at pgs. 7-8) FOP claimed that because of this violation the termination should be rescinded. Also, FOP contended that the evidence did not establish the Grievant's guilt. (See Award at pgs. 5-6)

MPD countered that termination was appropriate. Also, MPD claimed that it complied with the fifty-five day rule. (See Award at p. 6) Finally, MPD asserted that even if a violation of the fifty-five day rule occurred "the appropriate remedy would be to award back pay, if any, that the grievant lost owing to the delay in the issuance of the decision." (Award at p. 6).

In a Award issued on May 15, 2006, Arbitrator Steven Wolf concluded that MPD violated Article 12, Section 6 of the parties' CBA when it failed to issue a written decision within the fifty-five (55) day time limit. (See Award at p. 8) Specifically, the Arbitrator noted the following:

The facts reveal . . . [that] [t]he hearing was originally scheduled for May 22, 2003 but was continued at the grievant's request. The hearing actually commenced on June 19, 2003. Thus, under Article 12, Section 6(a), the time limit was at that point extended by twenty-eight (28) days. The hearing was again convened on July 22, 2003, an additional thirty three (33) days after the first hearing date. A third hearing date was needed, that date being August 6, 2003, extending the time limit an additional fifteen (15) days. Therefore, the total number of days by which postponements or continuances extended the 55-day time limit was seventy six (76) days. Adding the three days actually consumed by the hearings makes the grand total seventy-nine (79) days. If seventy-nine (79) days is added to the "base" 55-day time limit expiration date of May 28, 2003, that makes the date by which the Department's written decision was due as August 15, 2003. In fact, that decision was issued on September 16, 2003, which was thirty-two (32) days beyond the contractual deadline [of August 15, 2003]. . . . I am left, therefore, with the conclusion that the Department's September 16, 2003 Final Notice of Adverse Action was untimely filed. (Award at pgs. 7-8)

In light of the above, the Arbitrator rescinded the termination and ordered that the Grievant be reinstated with full back pay and benefits. (See Award at p. 11).

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy. (See Request at p. 2).

In support of this argument, MPD states the following:

In the instant matter, [the] Grievant was served with the notice of adverse action on April 3, 2003 stating that a hearing was set for May 22, 2003. On April 3, 2003, he responded with a letter requesting a hearing, thereby consenting to the hearing already set by the employer for May 22, 2003. Thereafter, [the] Grievant requested a postponement to June 19, 2003. The second continuance was to August 6, 2003, at which time the hearing concluded. Accordingly, [the] Grievant originally elected to have the hearing on May 22, 2003. However, the time between May 22, 2003, and August 6, 2003 was time during which [the] Grievant consented to the continuances, or time that was consumed by the hearing and thus excluded from the 55 day requirement of the CBA. . . Thus, the fifty-five (55) day period began to run on August 7, 2003, the day after the hearing was completed, and expired on October 4, 2003. (Request at pgs. 6-7)

In view of the above, MPD asserts that the "decision of September 16, 2003, was issued within forty (40) days of the hearing and was timely." (Request at p. 7) Therefore, MPD suggests that the Arbitrator's ruling that the Grievant did not waive the 55-day rule, is an incorrect interpretation of Article 12, Section 6 of the parties' CBA. (See Request at pgs. 5-7)

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip op. N. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement. . . as well as his evidentiary findings and conclusions. . . " Id. Moreover, "[this] Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to Arbitrator Wolf. Neither MPD's disagreement with the Arbitrator's interpretation of Article 12, Section 6, nor MPD's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Arbitrator's Award. See MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn), Slip Op. No. 845, PERB Case No. 05-A-01 (2006).

Also, MPD suggests that the plain language of Article 12, Section 6 of the parties' CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to and modified the parties' CBA. (See Request at pgs. 8-10)

MPD's arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the arbitrator's interpretation of Article 12, Section 6 of the parties' CBA. MPD merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the CBA. This we will not do.

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his authority when he rescinds a Grievant's termination for MPD's violation of Article 12, Section 6 of the parties' CBA. In those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See MPD and FOP/MPD Labor Committee (on behalf of Jay Hang), Slip Op. No 861, PERB Case No. 06-A-02 (2007), MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No 814, PERB Case No. 05-A-03 (2006) and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher) Slip Op. No., PERB Case 02-A-07, *affirmed by Judge Kravtz of the Superior Court in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002), *affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006). In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.¹ See, District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator Wolf concluded that MPD violated Article 12, Section 6 of the parties' CBA, he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Wolf did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Wolf acted within his authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (See Request at p. 2). For the reasons discussed below, we disagree.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F. 2d 1, 8 (D.C. Cir. 1986). A petitioner must

¹ We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

demonstrate that the arbitration award “compels” the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must “not be lead astray by our own (or anyone else’s) concept of ‘public policy’ no matter how tempting such a course might be in any particular factual setting.” District of Columbia Department of Corrections v. Teamsters Union Local 246, 54 A. 2d 319, 325 (D.C. 1989).

In the present case, MPD asserts that the Award is on its face contrary to law and public policy. Specifically, MPD argues that the Award violates the “prejudicial error” rule specified in D.C. Code §2-510(b)(2001 ed.). (See Request at p 7) We have previously considered and rejected this argument by stating the following:

MPD relies on D.C. Code §2-510(b) which permits a reviewing court to apply the “prejudicial error” rule. D.C. Code §2-510(b)(2001 ed.). However, the Arbitrator’s Award does not compel the violation of this section of the D.C. Code. MPD’s cited section is outside the Comprehensive Merit Personnel Act (“CMPA”) which governs this case. The CMPA itself has no provision requiring or permitting this Board to apply the “prejudicial error” rule.” See, D.C. Code § 1-601(2001 ed.) et seq. As such, the Award does not violate D.C. Code §2-510(b) or the CMPA which does not contain a “prejudicial error” rule.

Additionally, MPD relies on Schapansky v. Dep’t of Transp., FAA² and Shaw v. Postal Service³ which apply a “procedural error” requirement regarding the Civil Service Reform Act (“CSRA”)⁴. MPD argues that only “harmful procedural errors may vitiate an agency action.” 5 U.S.C. §7701(c)(2)(A). . . . However, the CSRA’s “procedural error” requirement is not applicable to this case because this requirement applies to federal employees who are covered by the CSRA and not employees of the District of

² 735 F. 2d 477 (Fed. Cir. 1984).

³ 697 F.2d 1078 (Fed. Cir. 1983).

⁴ U.S.C. §7701(c)(2)(A).

Columbia.⁵ Having no application to employees of the District of Columbia, section 7701 cannot be violated by the arbitrator's Award, and thus, the Award is not contrary to Schapansky, Shaw, or §7701(c)(2)(A) of the Civil Service Reform Act.

Furthermore, the Arbitrator had authority to interpret the parties' Agreement, and thus the Board must view the Arbitrator's interpretation of the contract as if the parties had included that interpretation in their agreement. See, Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17, 531 U.S. 57, 62 (2000). With no showing that the Agreement, as interpreted by the Arbitrator, would run contrary to D.C. Code §2-510(b), Schapansky and Shaw, or section 7701(c)(2)(A) of the Civil Service Reform Act, MPD's argument fails to provide a basis to vacate the Arbitrator's Award.

(MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No 814 at pgs. 8-9, PERB Case No. 05-A-03 (2006)).

In addition, MPD asserts that even if a violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (See Request at p. 7) In support of its position, MPD cites Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002). We have previously considered and rejected this argument. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006) MPD appealed our determination that the "harmless error rule" was not applicable in cases such as the one currently before the Board. The District of Columbia Court of Appeals rejected MPD's argument that a violation of the CBA's 55-day rule was subject to the "harmless error rule" by stating the following:

The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.* (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that had Officer Fisher, instead of electing arbitration with the sanction of the FOP, chosen to appeal her

⁵ 5 U.S.C. §7701 is not included among the provisions listed in D.C. Code §1-632.02 and thus does not apply to employees of the District of Columbia. See Newsome v. District of Columbia, 859 A.2d 630, 633 (D.C. 2004)(provisions of the CSRA not listed in D.C. Code §1-632.02 do not apply to employees of the District of Columbia hired prior to or after the effective date of the CMPA).

discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46 D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from *Cornelius* demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act. *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787⁶

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

In view of the above, we find no merit to MPD's arguments. Also, we find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

⁶The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the CBA is directory, rather than mandatory.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

February 12, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-18 was transmitted via Fax and U.S. Mail to the following parties on this the 12th day of February 2007.

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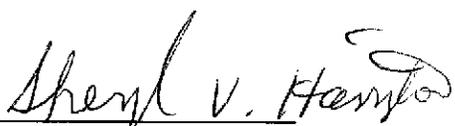
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